

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0178
Gross Income Tax & Penalty
For the Years 1996-2000**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Income Tax-Indiana Source Income

Authority: Ind. Code § 6-8.1-5-1.

Taxpayer protests the assessment of gross income tax with respect to receipts that reflect Taxpayer's receipts for services provided for an Indiana manager.

II. Tax Administration - Penalty

Authority: Ind. Code § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer is a subsidiary of a corporation in the business of selling children's clothing at retail. The parent corporation is divided into two subsidiaries-the retail stores, and a management company providing services to the retail stores. In Indiana, Taxpayer operates a number of stores and has a district store manager living in Indiana.

Taxpayer was audited for the years in question. As a result of the audit, Taxpayer was assessed gross income tax with respect to a portion of its "other income" deemed attributable to services provided by the Indiana manager. Further, a portion of the "other income" was deemed to be Indiana sales, in the proportion of Taxpayer's payroll factors. Taxpayer protested the assessment, stating that the fees in question represent reimbursement for services rendered outside Indiana, and therefore were not Indiana gross income.

Taxpayer had been notified by letter of a hearing. A representative of the Taxpayer called with respect to the letter and affirmed the time and date of the hearing. However, on the date and time

of the hearing, no representative of the Taxpayer either appeared at the Department or called the hearing officer. Accordingly, this letter of findings has been prepared based on the information in the file.

DISCUSSION

I. Gross Income Tax-Indiana Source Income

According to the audit report, the revenue for services provided by Taxpayer (listed by Taxpayer as "other income") should be pro rated to Indiana based on its Indiana payroll to its overall payroll. Taxpayer maintains that the revenue that the auditor seeks to allocate is solely for a reimbursement for services performed and corporate overhead expenses incurred at its California headquarters, and therefore not subject to gross income tax. Further, Taxpayer maintains that the district sales manager located in Indiana did not produce income for Taxpayer, and that the manager did services in states other than Indiana. However, Taxpayer did not provide any additional information to substantiate that the auditor was incorrect-its burden, per Ind. Code § 6-8.1-5-1. Accordingly, the auditor's determination must be permitted to stand.

With respect to adjusted gross income tax, it is not entirely clear whether this was raised. The protest is in the nature of a gross income tax protest, though the amount Taxpayer has protested includes the adjusted gross income tax for 2000. Nevertheless, Taxpayer has not presented an argument sufficient to meet its statutory burden.

FINDING

Taxpayer's protest is denied.

II. Tax Administration-Penalty

DISCUSSION

Taxpayer argues that it is not subject to negligence penalties with respect to the additional taxes assessed against it. In particular, Taxpayer argues that the additional tax was due to its different, but reasonable, interpretation of the statute. Accordingly, it argues that it was not negligent in its tax returns for the years in question.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. Ind. Code § 6-8.1-10-2.1. The Indiana Administrative Code further provides:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow

instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

45 IAC 15-11-2.

Taxpayer has presented an argument that its position was based on a reasonable interpretation of Indiana law, and accordingly was not negligent.

FINDING

Taxpayer's protest is sustained.